



6712-01

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 79

[MB Docket No. 12-108; FCC 15-156]

Accessibility of User Interfaces, and Video Programming Guides and Menus

AGENCY: Federal Communications Commission.

ACTION: Proposed rule.

SUMMARY: In this document, the Commission seeks comment on a proposal to adopt rules that would require manufacturers and MVPDs to ensure that consumers are able to readily access user display settings for closed captioning.

DATES: Comments are due on or before **[INSERT DATE 20 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**; reply comments are due on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: You may submit comments, identified by MB Docket No. 12-108, by any of the following methods:

- Federal Communications Commission (FCC) Electronic Comment Filing System (ECFS)
Web Site: <http://fjallfoss.fcc.gov/ecfs2/>. Follow the instructions for submitting comments.
- Mail: U.S. Postal Service first-class, Express, and Priority mail must be addressed to the FCC Secretary, Office of the Secretary, Federal Communications Commission, 445 12th Street SW, Washington, DC 20554. Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.

- **Hand or Messenger Delivery:** All hand-delivered or messenger-delivered paper filings for the FCC Secretary must be delivered to FCC Headquarters at 445 12th Street SW, Room TW-A325, Washington, DC 20554.
- **People with Disabilities:** Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, etc.) by e-mail: FCC504@fcc.gov or phone: 202-418-0530; or TTY: 202-418-0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the “PROCEDURAL MATTERS” heading of the SUPPLEMENTARY INFORMATION section of this document.

FOR FURTHER INFORMATION CONTACT: Maria Mullarkey, Maria.Mullarkey@fcc.gov, of the Media Bureau, Policy Division, (202) 418-2120. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, contact Cathy Williams at (202) 418–2918 or send an email to PRA@fcc.gov.

SUPPLEMENTARY INFORMATION: This is a summary of the Commission’s Second Further Notice of Proposed Rulemaking (Second Further NPRM), FCC 15-156, adopted on November 18, 2015, and released on November 20, 2015. For background, see the summary of the Second Report and Order accompanying the Second Further NPRM published in this issue of the Federal Register. The full text of this document is available electronically via the FCC’s Electronic Document Management System (EDOCS) Web Site at http://fjallfoss.fcc.gov/edocs_public/ or via the FCC’s Electronic Comment Filing System (ECFS) Web Site at <http://fjallfoss.fcc.gov/ecfs2/>. Documents will be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat. This document is also available for public inspection and copying during regular business hours in the FCC Reference Information Center, Federal Communications Commission, 445 12th Street, SW, CY-A257, Washington, DC 20554.

Alternative formats are available for people with disabilities (Braille, large print, electronic files, audio format), by sending an e-mail to fcc504@fcc.gov or calling the Commission's Consumer and Governmental Affairs Bureau at (202) 418-0530 (voice), (202) 418-0432 (TTY).

I. INTRODUCTION

1. In this Second Further Notice of Proposed Rulemaking ("Second Further NPRM"), we seek comment on a proposal to adopt rules that would require manufacturers and MVPDs to ensure that consumers are able to readily access user display settings for closed captioning.

II. SECOND FURTHER NOTICE OF PROPOSED RULEMAKING

2. In this Second Further NPRM, we seek comment on a proposal to adopt rules that would require manufacturers and MVPDs to ensure that consumers are able to readily access user display settings for closed captioning and we seek comment on the Commission's authority to adopt such rules under the Television Decoder Circuitry Act of 1990 ("TDCA").¹ In the Further Notice of Proposed Rulemaking ("Further NPRM"), we inquired whether Sections 204 and 205 of the CVAA provide the Commission with authority to adopt such a requirement.² Upon further review of the issue, we continue to believe that there are important public interest considerations in favor of ensuring that consumers are able to readily access user display settings for closed captioning, and we seek comment on whether the TDCA provides authority to adopt regulations that would facilitate such access because it mandates that the Commission take steps

¹ Pub. L. 101-431, 104 Stat. 960 (1990) (codified at 47 U.S.C. 303(u), 330(b)).

² Accessibility of User Interfaces, and Video Programming Guides and Menus; Accessible Emergency Information, and Apparatus Requirements for Emergency Information and Video Description: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, MB Docket Nos. 12-108, 12-107, Report and Order and Further Notice of Proposed Rulemaking, 78 FR 77210, 78 FR 77074, para. 140 (2013) ("Report and Order and Further NPRM"). In response to the Further NPRM, we received comments on the issue of our authority under Sections 204 and 205, which we are continuing to evaluate.

to ensure that closed captioning service continues to be available to consumers.³

3. The TDCA requires generally that television receivers and other apparatus⁴ contain circuitry to decode and display closed captioning⁵ and directs that our “rules shall provide performance and display standards for such built-in decoder circuitry or capability designed to display closed captioned video programming.”⁶ In 2000, the Commission adopted technical standards for the display of closed captions on digital television receivers “to ensure that closed-captioning service continues to be available to consumers” following the transition to digital service.⁷ In particular, the Commission adopted with some modifications Section 9 of EIA-708, an industry standard addressing closed captioning for digital television, which supports user options that enable caption display to be customized for a particular viewer by allowing the viewer to change the appearance of the captions to suit his or her needs.⁸ As we noted in the Further NPRM,⁹ when the Commission adopted the technical standards, it explained that the “capability to alter fonts, sizes, colors, backgrounds and more, can enable a greater number of persons who are deaf and hard of hearing to take advantage of closed captioning.”¹⁰ Notably, the Commission concluded that “[o]nly by requiring decoders to respond to these various [display] features can we ensure that closed captioning will be accessible for the greatest number of persons who are deaf and hard of hearing, and thereby achieve Congress’ vision that to the

³ See S. Rep. 101-393, 1990 USCCAN 1438 (explaining that the TDCA “charges the [FCC] with ensuring that closed-captioning services are available to the public as new technologies are developed”).

⁴ See 47 U.S.C. 303(u)(1) (requiring that “apparatus designed to receive or play back video programming transmitted simultaneously with sound” contain circuitry to decode and display closed captioning).

⁵ See *id.* 303(u)(1)(A).

⁶ See *id.* 330(b).

⁷ See *id.* 303(u) (as amended by Section 203 of the CVAA), 330(b); Closed Captioning Requirements for Digital Television Receivers; Closed Captioning and Video Description of Video Programming. Implementation of Section 305 of the Telecommunications Act of 1996, Video Programming Accessibility, ET Docket No. 99-254, MM Docket No. 95-176, Report and Order, 65 FR 58467 (2000) (“DTV Closed Captioning Order”).

⁸ DTV Closed Captioning Order, para. 7.

⁹ Report and Order and Further NPRM, para. 141.

¹⁰ DTV Closed Captioning Order, para. 10. After pointing out that Congress noted that captioning will benefit “older Americans who have some loss of hearing,” *id.* at para. 11 (quoting TDCA, sec. 2(4)), the Commission found that the benefits of being able to alter closed captions extend to older Americans who may have some hearing loss along with a visual disability. *Id.*

fullest extent made possible by technology, people who are deaf or hard of hearing have equal access to the television medium.”¹¹

4. We seek comment on whether the TDCA gives the Commission authority to adopt further implementing regulations to ensure that consumers are able to readily access user display settings for closed captioning. Specifically, the TDCA, as codified in Section 330(b) of the Act, provides that “[a]s new video technology is developed, the Commission shall take such action as the Commission determines appropriate to ensure that closed-captioning service continues to be available to consumers.”¹² In enacting the TDCA, Congress stated that “to the fullest extent made possible by technology,” persons who are deaf and hard of hearing “should have equal access to the television medium.”¹³ We believe that adopting rules requiring that consumers are able to readily access user display settings for closed captioning will “ensure that closed-captioning service continues to be available to consumers” and, in particular, that enabling viewers who are deaf and hard of hearing to set caption display features, such as colors, fonts, sizes, and backgrounds, will ensure that such individuals can benefit fully from digital television technologies.¹⁴ We seek comment on this analysis.

5. Although the rules implemented in 2000 were intended to provide consumers with the benefits of customization for closed captioning, the record indicates that these features remain inaccessible to many viewers who are deaf and hard of hearing because they are difficult to locate and use. As discussed in the Further NPRM, Consumer/Academic Groups reference the “long and frustrating history of the difficulties in accessing closed captioning features on apparatus and navigation devices,” and describe the “[m]ost infamously difficult” example, in which a cable box must first be turned off in order to access the captioning mechanisms through

¹¹ Id. at para. 13. See also Pub. L. 101-431, sec. 2(1).

¹² Pub. L. 101-431, sec. 4; 47 U.S.C. 330(b).

¹³ Pub. L. 101-431, sec. 2(1).

¹⁴ See id. at sec. 4; 47 U.S.C. 330(b).

a special menu feature.¹⁵ Consumer/Academic Groups explain that “it is critically important that the display settings are easily accessible and easily adjustable without difficulty everywhere,” including restaurants and other public places.¹⁶ We believe that public interest considerations weigh in favor of adopting requirements to ensure that consumers are able to readily access user display settings for closed captioning, and we believe that such requirements will fulfill our statutory mandate under Section 330(b) of the Act to ensure that closed captioning service continues to be available to consumers and effectuate Congress’s intent that individuals who are deaf and hard of hearing have equal access to video programming to the fullest extent made possible by technology.¹⁷ We seek comment on this proposal, on the costs and benefits of these requirements, and on the impact of the proposed rules on small entities.

6. Further, we seek comment on how we would implement a requirement that consumers be able to readily access user display settings for closed captioning. Consumer/Academic Groups contend that access to closed captioning display features should not be lower than the first level of a menu,¹⁸ arguing that if users are unable to locate closed captioning display settings that are buried in multiple levels of a menu, “then they are unlikely to

¹⁵ See Comments of the National Association of the Deaf et al., MB Docket No. 12-108, at 8 (July 15, 2013). See also Letter from Andrew S. Phillips, Policy Counsel, NAD, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-108, at 3 (Sept. 11, 2013) (noting that “[t]o this day, many people who are deaf or hard of hearing continue to have difficulties accessing closed captioning controls on MVPD-provided products,” and that consumers must “navigate complex menu settings in order to find the closed captioning control or configuration settings”); Comments of the National Association of the Deaf, Telecommunications for the Deaf and Hard of Hearing, Inc., Deaf and Hard of Hearing Consumer Advocacy Network, Association of Late-Deafened Adults, Inc., Hearing Loss Association of America, California Coalition of Agencies Serving the Deaf and Hard of Hearing, Cerebral Palsy and Deaf Organization, and Telecommunication-RERC at 8-9, 11 (“Consumer/Academic Groups Comments”).

¹⁶ Consumer/Academic Groups Comments at 9. Consumer/Academic Groups emphasize that “[t]he CVAA applies to all devices that we access at home, in public establishments, schools, workplaces, and everywhere, not just those devices in our possession and familiar to us.” Id.

¹⁷ See 47 U.S.C. 330(b); H.R. Rep. No. 111-563, 111th Cong., 2d Sess. at 19 (2010); S. Rep. No. 111-386, 111th Cong., 2d Sess. at 1 (2010). See also Pub. L. 101-431, sec. 2(1).

¹⁸ To provide an example of what it means to activate closed captioning in the “first level of a menu,” Consumer/Academic Groups in comments responding to the NPRM cited “the web-based YouTube video player,” explaining that “[t]o access the captioning settings on the YouTube player, the user first clicks the ‘CC’ button at the bottom of the screen, then clicks ‘Settings...,’ and then a box appears which allows users to adjust the closed captioning settings.” Comments of the National Association of the Deaf et al., MB Docket No. 12-108, at 11 (July 15, 2013).

be able to alter the font, sizes, and/or backgrounds to fit their particular needs” and “captions will remain at hard-to-read levels – such as with fonts that are too small or with poor contrast, frustrating each individual’s ability to access programming in a way that best suits their needs.”¹⁹ Should we require that inclusion of closed captioning display settings must be no lower than the first level of a menu? Would this approach provide industry with flexibility to develop other innovative ways for users to access and locate closed captioning display settings? We seek comment on alternative ways to implement this requirement.

7. We also seek comment on steps industry already is taking or planning to take to facilitate access to user display settings for closed captioning. We note that, in response to questions regarding the state of industry readiness in complying with the requirements adopted in the Report and Order, CEA queried its members and reported that “TV manufacturers intend to make caption display settings accessible via mechanisms reasonably comparable to a button, key, or icon through several methods including a button on the remote or access through the first level of a menu,” and that “manufacturers are making efforts to streamline access to the ANSI/CEA-708 attributes.”²⁰ We seek input on whether there is a need to adopt regulations given current plans of industry with regard to facilitating access to user display settings for closed captioning.

8. We believe that a requirement that consumers be able to readily access user display settings for closed captioning should apply to apparatus covered by Section 303(u)(1) of the Act (i.e., apparatus designed to receive or play back video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States and uses a picture screen of any size),²¹ as interpreted consistently

¹⁹ Consumer/Academic Groups Comments at 9.

²⁰ Letter from Julie M. Kearney, Vice President, Regulatory Affairs, CEA, to Marlene H. Dortch, Secretary, FCC, MB Docket No. 12-108, at 2 (Mar. 3, 2015).

²¹ 47 U.S.C. 303(u)(1).

with our precedent in the IP Closed Captioning Order.²² We seek comment on this analysis. We also seek comment on whether the exceptions relating to technical feasibility and achievability in Section 303(u) of the Act should apply in this context.²³ In addition, we seek comment on which entities should be responsible for compliance. Should both manufacturers and MVPDs be obligated to facilitate the ability of consumers to locate and control closed captioning display settings? For example, where closed captioning display settings are accessed through the television or set-top box, would the manufacturer of such device be solely responsible for ensuring that the display settings are readily accessible? Or would MVPDs also have responsibility with respect to ensuring their customers are able to readily access closed captioning display settings?

9. Finally, if the Commission adopts rules, what time frame would be appropriate for requiring covered entities to ensure that consumers are able to readily access user display settings for closed captioning? In particular, we seek comment on Consumer/Academic Groups' request that the compliance deadline for readily accessible closed captioning display settings be the same as the December 20, 2016 deadline for the closed captioning activation mechanism adopted pursuant to Sections 204 and 205 of the CVAA.²⁴ We ask commenters to justify any deadline they propose by explaining what must be done by that deadline to comply with the proposed requirement.

²² See Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, MB Docket No. 11-154, Report and Order, 77 FR 46632, paras. 93-96 (2012) ("IP Closed Captioning Order"). Under this interpretation, apparatus exempt from the requirement to be equipped with built-in closed caption decoder circuitry or capability designed to display closed-captioned video programming (e.g., display-only video monitors, and apparatus primarily designed for purposes other than receiving or playing back video programming) would not be subject to the requirements proposed herein. See *id.* at paras. 106-08. See also Closed Captioning of Internet Protocol-Delivered Video Programming: Implementation of the Twenty-First Century Communications and Video Accessibility Act of 2010, MB Docket No. 11-154, Order on Reconsideration and Further Notice of Proposed Rulemaking, 78 FR 39691, 78 FR 39619, paras. 5-15 (2013).

²³ 47 U.S.C. 303(u), 303(u)(2); IP Closed Captioning Order, paras. 97-98, 104-05.

²⁴ See Consumer/Academic Groups Comments at 10-11.

III. PROCEDURAL MATTERS

A. Initial Regulatory Flexibility Act

10. As required by the Regulatory Flexibility Act of 1980, as amended (“RFA”),²⁵ the Commission has prepared this present Initial Regulatory Flexibility Analysis (“IRFA”) concerning the possible economic impact on small entities by the policies and rules proposed in the Second Further NPRM. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments as specified in the Second Further NPRM. The Commission will send a copy of the Second Further NPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (“SBA”).²⁶ In addition, the Second Further NPRM and this IRFA (or summaries thereof) will be published in the Federal Register.²⁷

1. Need for, and Objectives of, the Proposed Rule Changes

11. In the Second Further NPRM, the Commission seeks comment on a proposal to adopt rules that would require manufacturers and multichannel video programming distributors (“MVPDs”) to ensure that consumers are able to readily access user display settings for closed captioning and seeks comment on the Commission’s authority to adopt such rules under the Television Decoder Circuitry Act of 1990 (“TDCA”). The TDCA, as codified in Section 330(b) of the Act, provides that “[a]s new video technology is developed, the Commission shall take such action as the Commission determines appropriate to ensure that closed-captioning service continues to be available to consumers.” In enacting the TDCA, Congress stated that “to the fullest extent made possible by technology,” persons who are deaf and hard of hearing “should have equal access to the television medium.” Although the rules implemented in 2000 were

²⁵ See 5 U.S.C. 603. The RFA, see 5 U.S.C. 601 – 612, has been amended by the Small Business Regulatory Enforcement Fairness Act of 1996 (“SBREFA”), Pub. L. 104-121, Title II, 110 Stat. 857 (1996).

²⁶ See 5 U.S.C. 603(a).

²⁷ See id.

intended to provide consumers with the benefits of customization for closed captioning (i.e., the ability to alter fonts, sizes, colors, backgrounds and more), the record indicates that these features remain inaccessible to many viewers who are deaf and hard of hearing because they are difficult to locate and use. The proposed rules requiring that consumers are able to readily access user display settings for closed captioning will “ensure that closed-captioning service continues to be available to consumers” and, in particular, that the benefits of being able to alter colors, fonts, and sizes offered by digital captioning technology fully accrue to individuals who are deaf or hard of hearing.

2. Legal Basis

12. The proposed action is authorized pursuant to the Television Decoder Circuitry Act of 1990, Pub. L. 101-431, 104 Stat. 960, and the authority contained in Sections 4(i), 4(j), 303(u), and 330(b) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(u), 330(b).

3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules Will Apply

13. The RFA directs the Commission to provide a description of and, where feasible, an estimate of the number of small entities that will be affected by the rules proposed in the Second Further NPRM. The RFA generally defines the term “small entity” as having the same meaning as the terms “small business,” “small organization,” and “small governmental jurisdiction.” In addition, the term “small business” has the same meaning as the term “small business concern” under the Small Business Act. A “small business concern” is one which: (1) is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA. Small entities that are directly affected by the rules proposed in the Second Further NPRM include manufacturers of apparatus

covered by Section 303(u)(1) of the Act (i.e., apparatus designed to receive or play back video programming transmitted simultaneously with sound, if such apparatus is manufactured in the United States or imported for use in the United States and uses a picture screen of any size) and MVPDs.

14. Cable Television Distribution Services. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline businesses. This category is defined as follows: “This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services.” The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees. Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

15. Cable Companies and Systems. The Commission has also developed its own small business size standards for the purpose of cable rate regulation. Under the Commission’s rules, a “small cable company” is one serving 400,000 or fewer subscribers nationwide. Industry data shows that there were 1,141 cable companies at the end of June 2012. Of this total, all but 10 incumbent cable companies are small under this size standard. In addition, under the

Commission's rate regulation rules, a "small system" is a cable system serving 15,000 or fewer subscribers. Current Commission records show 4,945 cable systems nationwide. Of this total, 4,380 cable systems have less than 20,000 subscribers, and 565 systems have 20,000 subscribers or more, based on the same records. Thus, under this standard, we estimate that most cable systems are small.

16. Cable System Operators (Telecom Act Standard). The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed \$250,000,000." There are approximately 56.4 million incumbent cable video subscribers in the United States today. Accordingly, an operator serving fewer than 564,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed \$250 million in the aggregate. Based on available data, we find that all but 10 incumbent cable operators are small under this size standard. We note that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed \$250 million. Although it seems certain that some of these cable system operators are affiliated with entities whose gross annual revenues exceed \$250,000,000, we are unable at this time to estimate with greater precision the number of cable system operators that would qualify as small cable operators under the definition in the Communications Act.

17. Direct Broadcast Satellite (DBS) Service. DBS service is a nationally distributed subscription service that delivers video and audio programming via satellite to a small parabolic "dish" antenna at the subscriber's location. DBS, by exception, is now included in the SBA's broad economic census category, Wired Telecommunications Carriers, which was developed for

small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees. Therefore, under this size standard, the majority of such businesses can be considered small. However, the data we have available as a basis for estimating the number of such small entities were gathered under a superseded SBA small business size standard formerly titled “Cable and Other Program Distribution.” The definition of Cable and Other Program Distribution provided that a small entity is one with \$12.5 million or less in annual receipts. Currently, only two entities provide DBS service, which requires a great investment of capital for operation: DIRECTV and DISH Network. Each currently offer subscription services. DIRECTV and DISH Network each report annual revenues that are in excess of the threshold for a small business. Because DBS service requires significant capital, we believe it is unlikely that a small entity as defined by the SBA would have the financial wherewithal to become a DBS service provider.

18. Satellite Master Antenna Television (SMATV) Systems, also known as Private Cable Operators (PCOs). SMATV systems or PCOs are video distribution facilities that use closed transmission paths without using any public right-of-way. They acquire video programming and distribute it via terrestrial wiring in urban and suburban multiple dwelling units such as apartments and condominiums, and commercial multiple tenant units such as hotels and office buildings. SMATV systems or PCOs are now included in the SBA’s broad economic census category, Wired Telecommunications Carriers, which was developed for small wireline businesses. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818

establishments had 100 or more employees. Therefore, under this size standard, the majority of such businesses can be considered small.

19. Home Satellite Dish (HSD) Service. HSD or the large dish segment of the satellite industry is the original satellite-to-home service offered to consumers, and involves the home reception of signals transmitted by satellites operating generally in the C-band frequency. Unlike DBS, which uses small dishes, HSD antennas are between four and eight feet in diameter and can receive a wide range of unscrambled (free) programming and scrambled programming purchased from program packagers that are licensed to facilitate subscribers' receipt of video programming. Because HSD provides subscription services, HSD falls within the SBA-recognized definition of Wired Telecommunications Carriers. The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees. Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities.

20. Open Video Services. The open video system (OVS) framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA small business size standard covering cable services, which is Wired Telecommunications Carriers. The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818

establishments had 100 or more employees. Therefore, under this size standard, we estimate that the majority of businesses can be considered small entities. In addition, we note that the Commission has certified some OVS operators, with some now providing service. Broadband service providers (“BSPs”) are currently the only significant holders of OVS certifications or local OVS franchises. The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

21. Wireless cable systems – Broadband Radio Service and Educational Broadband Service. Wireless cable systems use the Broadband Radio Service (BRS) and Educational Broadband Service (EBS) to transmit video programming to subscribers. In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than \$40 million in the previous three calendar years. The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas (BTAs). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, we estimate that of the 61 small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, we find that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission’s rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission offered three levels of bidding credits: (i) a bidder with attributed average annual gross revenues that exceed \$15 million and do not exceed \$40 million for the preceding three years (small business)

received a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed \$3 million and do not exceed \$15 million for the preceding three years (very small business) received a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed \$3 million for the preceding three years (entrepreneur) received a 35 percent discount on its winning bid. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the 10 winning bidders, two bidders that claimed small business status won four licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

22. In addition, the SBA's placement of Cable Television Distribution Services in the category of Wired Telecommunications Carriers is applicable to cable-based Educational Broadcasting Services. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers, which was developed for small wireline businesses. This category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies. Establishments in this industry use the wired telecommunications network facilities that they operate to provide a variety of services, such as wired telephony services, including VoIP services; wired (cable) audio and video programming distribution; and wired broadband Internet services. The SBA has developed a small business size standard for this category, which is: all such businesses having 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees. Therefore, under this size standard, we estimate that

the majority of businesses can be considered small entities. In addition to Census data, the Commission's internal records indicate that as of September 2012, there are 2,241 active EBS licenses. The Commission estimates that of these 2,241 licenses, the majority are held by non-profit educational institutions and school districts, which are by statute defined as small businesses.

23. Incumbent Local Exchange Carriers (ILECs). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. ILECs are included in the SBA's economic census category, Wired Telecommunications Carriers. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees. Therefore, under this size standard, the majority of such businesses can be considered small.

24. Small Incumbent Local Exchange Carriers. We have included small incumbent local exchange carriers in this present RFA analysis. A "small business" under the RFA is one that, inter alia, meets the pertinent small business size standard (e.g., a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope. We have therefore included small incumbent local exchange carriers in this RFA analysis, although we emphasize that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

25. Competitive Local Exchange Carriers (CLECs), Competitive Access Providers (CAPs), Shared-Tenant Service Providers, and Other Local Service Providers. Neither the

Commission nor the SBA has developed a small business size standard specifically for these service providers. These entities are included in the SBA's economic census category, Wired Telecommunications Carriers. Under this category, the SBA deems a wireline business to be small if it has 1,500 or fewer employees. Census data for 2007 shows that there were 31,996 establishments that operated that year. Of this total, 30,178 establishments had fewer than 100 employees, and 1,818 establishments had 100 or more employees. Therefore, under this size standard, the majority of such businesses can be considered small.

26. Radio and Television Broadcasting and Wireless Communications Equipment Manufacturing. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing radio and television broadcast and wireless communications equipment. Examples of products made by these establishments are: transmitting and receiving antennas, cable television equipment, GPS equipment, pagers, cellular phones, mobile communications equipment, and radio and television studio and broadcasting equipment." The SBA has developed a small business size standard for this category, which is: all such businesses having 750 or fewer employees. Census data for 2007 shows that there were 939 establishments that operated for part or all of the entire year. Of those, 912 operated with fewer than 500 employees, and 27 operated with 500 or more employees. Therefore, under this size standard, the majority of such establishments can be considered small.

27. Audio and Video Equipment Manufacturing. The Census Bureau defines this category as follows: "This industry comprises establishments primarily engaged in manufacturing electronic audio and video equipment for home entertainment, motor vehicles, and public address and musical instrument amplification. Examples of products made by these establishments are video cassette recorders, televisions, stereo equipment, speaker systems, household-type video cameras, jukeboxes, and amplifiers for musical instruments and public

address systems.” The SBA has developed a small business size standard for this category, which is: all such businesses having 750 or fewer employees. Census data for 2007 shows that there were 492 establishments in this category operated for part or all of the entire year. Of those, 488 operated with fewer than 500 employees, and four operated with 500 or more employees. Therefore, under this size standard, the majority of such establishments can be considered small.

4. Description of Projected Reporting, Recordkeeping, and Other Compliance Requirements

28. In the Second Further NPRM, the Commission seeks comment on a proposal to adopt rules that would require manufacturers and MVPDs to ensure that consumers are able to readily access user display settings for closed captioning and seeks comment on the Commission’s authority to adopt such rules under the TDCA. In this section, we describe the reporting, recordkeeping, and other compliance requirements proposed in the Second Further NPRM and consider whether small entities are affected disproportionately by any such requirements.

29. Reporting Requirements. The Second Further NPRM does not propose to adopt reporting requirements.

30. Recordkeeping Requirements. If the rules proposed in the Second Further NPRM were adopted, certain recordkeeping requirements would be applicable to covered small entities. The Second Further NPRM asks whether we should apply the exceptions relating to technical feasibility and achievability in Section 303(u) of the Act consistent with our precedent in the IP Closed Captioning Order. These provisions would require covered entities to make a filing and, thus, to make and keep records of the filing.

31. Other Compliance Requirements. The Second Further NPRM proposes other

compliance requirements that would be applicable to covered small entities. In particular, the Second Further NPRM seeks comment on whether the TDCA gives the Commission authority to adopt further implementing regulations to ensure that consumers are able to readily access user display settings for closed captioning. The Second Further NPRM seeks comment on how the Commission would implement a requirement that consumers be able to readily access user display settings for closed captioning and, in particular, whether to require that inclusion of closed captioning display settings must be no lower than the first level of a menu.

32. We do not have specific information quantifying the costs and administrative burdens associated with the rules proposed in the Second Further NPRM because it has not yet been determined how covered entities will implement a requirement that consumers be able to readily access user display settings for closed captioning. Thus, we cannot precisely estimate the impact of the rules proposed in the Second Further NPRM on small entities. We note that CEA has reported that some industry members are already planning to take steps to facilitate access to user display settings for closed captioning and thus, the burden for some covered entities may be minimal. Further, we explore whether entities subject to the proposed rules need not comply with the requirements if they are able to demonstrate to the Commission that compliance is not achievable. While the economic impact of the rules on small entities is not quantifiable at this time, the proposed rules, if adopted, could affect small companies to a greater extent than large companies. As a result, the Commission below considers alternatives that have the potential to minimize the economic effect of its proposed rules on small entities.

5. Steps Taken to Minimize Significant Impact on Small Entities and Significant Alternatives Considered

33. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include the following four alternatives

(among others): (1) the establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance and reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

34. The rules proposed in the Second Further NPRM, if adopted, could have a significant economic impact on small entities. As discussed below, Section 303(u) of the Act contains provisions that allow the Commission to tailor its rules, as necessary, to small entities for whom compliance with such rules is economically burdensome, and we inquire in the Second Further NPRM whether these exceptions should apply. Notably, we ask whether an entity (including a small entity) should avoid compliance with a requirement to ensure that users can readily access closed captioning display settings if it is able to demonstrate to the Commission that such compliance is not “achievable” (i.e., cannot be accomplished with reasonable effort or expense) or is not “technically feasible.” These procedures will allow the Commission to address the impact of the rules on individual entities, including smaller entities, on a case-by-case basis, and to modify application of its rules to accommodate individual circumstances, thereby potentially reducing the costs of compliance for such entities. We note that two of the four statutory factors that the Commission must consider in assessing achievability are particularly relevant to small entities: (i) the nature and cost of the steps needed to meet the requirements, and (ii) the technical and economic impact on the entity’s operations. Thus, a small entity may be able to avoid compliance in cases where it can demonstrate that compliance is not achievable.

35. Further, the Commission seeks comment on how alternative ways to implement a requirement that consumers be able to readily access user display settings for closed captioning,

as well as on the costs and benefits of such a requirement and the impact of the proposed rules on small entities. These considerations will allow the Commission to address alternatives that can potentially minimize the burden and costs of compliance for covered entities, including smaller entities.

36. Based on these considerations, we believe that, in proposing additional rules in the Second Further NPRM, we have appropriately considered both the interests of individuals with disabilities and the interests of the entities who will be subject to the rules, including those that are smaller entities, consistent with Congress’s intent that “to the fullest extent made possible by technology,” persons who are deaf and hard of hearing “should have equal access to the television medium.”

6. Federal Rules that May Duplicate, Overlap, or Conflict with the Proposed Rule

37. None

B. Paperwork Reduction Act

38. The Second Further NPRM may result in new or revised information collection requirements. If the Commission adopts any new or revised information collection requirement, the Commission will publish a notice in the Federal Register inviting the public to comment on the requirement, as required by the Paperwork Reduction Act of 1995, Public Law 104-13 (44 U.S.C. 3501-3520). In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107 198, see 44 U.S.C. 3506(c)(4), the Commission seeks specific comment on how it might “further reduce the information collection burden for small business concerns with fewer than 25 employees.”

C. Ex Parte Rules

39. We remind interested parties that this proceeding is treated as a “permit-but-

disclose” proceeding in accordance with the Commission’s ex parte rules.²⁸ Persons making ex parte presentations must file a copy of any written presentation or a memorandum summarizing any oral presentation within two business days after the presentation (unless a different deadline applicable to the Sunshine period applies). Persons making oral ex parte presentations are reminded that memoranda summarizing the presentation must (1) list all persons attending or otherwise participating in the meeting at which the ex parte presentation was made, and (2) summarize all data presented and arguments made during the presentation. If the presentation consisted in whole or in part of the presentation of data or arguments already reflected in the presenter’s written comments, memoranda, or other filings in the proceeding, the presenter may provide citations to such data or arguments in his or her prior comments, memoranda, or other filings (specifying the relevant page and/or paragraph numbers where such data or arguments can be found) in lieu of summarizing them in the memorandum. Documents shown or given to Commission staff during ex parte meetings are deemed to be written ex parte presentations and must be filed consistent with rule 1.1206(b). In proceedings governed by rule 1.49(f) or for which the Commission has made available a method of electronic filing, written ex parte presentations and memoranda summarizing oral ex parte presentations, and all attachments thereto, must be filed through the electronic comment filing system available for that proceeding, and must be filed in their native format (e.g., .doc, .xml, .ppt, searchable .pdf). Participants in this proceeding should familiarize themselves with the Commission’s ex parte rules.

D. Filing Requirements

40. Pursuant to Sections 1.415 and 1.419 of the Commission’s rules,²⁹ interested parties may file comments and reply comments on or before the dates indicated on the first page of this document. All comments are to reference **MB Docket No. 12-108** and may be filed

²⁸ 47 CFR 1.1200 et seq.

²⁹ *See* 47 CFR 1.415, 1419.

using: (1) the Commission's Electronic Comment Filing System (ECFS) or (2) by filing paper copies.³⁰

- Electronic Filers: Comments may be filed electronically using the Internet by accessing the ECFS: <http://fjallfoss.fcc.gov/ecfs2/>.
- Paper Filers: Parties who choose to file by paper must file an original and one copy of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th Street, SW, Room TW-A325, Washington, DC 20554. The filing hours are 8:00 a.m. to 7:00 p.m. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes and boxes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW, Washington DC 20554.

41. People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to

³⁰ See Electronic Filing of Documents in Rulemaking Proceedings, GC Docket No. 97-113, Report and Order, 63 FR 24121 (1998).

fcc504@fcc.gov or call the Consumer & Governmental Affairs Bureau at 202-418-0530 (voice), 202-418-0432 (tty).

42. Availability of Documents. Comments and reply comments will be publically available online via ECFS.³¹ These documents will also be available for public inspection during regular business hours in the FCC Reference Information Center, which is located in Room CY-A257 at FCC Headquarters, 445 12th Street, SW, Washington, DC 20554. The Reference Information Center is open to the public Monday through Thursday from 8:00 a.m. to 4:30 p.m. and Friday from 8:00 a.m. to 11:30 a.m.

IV. ORDERING CLAUSES

43. Accordingly, **IT IS ORDERED** that, pursuant to the Twenty-First Century Communications and Video Accessibility Act of 2010, Pub. L. 111-260, 124 Stat. 2751, and the authority found in Sections 4(i), 4(j), 303(r), 303(u), 303(aa), 303(bb), and 716(g) of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), 154(j), 303(r), 303(u), 303(aa), 303(bb), and 617(g), this Second Further Notice of Proposed Rulemaking **IS ADOPTED**.

44. **IT IS FURTHER ORDERED** that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, **SHALL SEND** a copy of this Second Further Notice of Proposed Rulemaking in MB Docket No. 12-108, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subject in 47 CFR 79

Cable television operators, Communications equipment, Multichannel video programming distributors (MVPDs), Satellite television service providers.

FEDERAL COMMUNICATIONS COMMISSION

³¹ Documents will generally be available electronically in ASCII, Microsoft Word, and/or Adobe Acrobat.

Marlene H. Dortch,
Secretary.
Office of the Secretary

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 79 as follows:

PART 79—ACCESSIBILITY OF VIDEO PROGRAMMING

1. The authority for part 79 continues to read as follows:

Authority: 47 U.S.C. 151, 152(a), 154(i), 303, 307, 309, 310, 330, 544a, 613, and 617.

2. Amend § 79.103 by adding paragraph (e) to read as follows:

§79.103 Closed caption decoder requirements for apparatus.

* * * * *

(e) Access to closed captioning display settings. Apparatus subject to this section must ensure that consumers are able to readily access user display settings for closed captioning, if technically feasible, except that apparatus that use a picture screen of less than 13 inches in size must comply with this requirement only if doing so is achievable as defined in this section.

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